

**THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA**

Case No. IT-95-5/18-T

IN THE TRIAL CHAMBER

Before: Judge O-Gon Kwon, Presiding
Judge Melville Baird
Judge Howard Morrison
Judge Flavia Lattanzi, Reserve Judge

Registrar: Mr. John Hocking

Date: 11 February 2011

THE PROSECUTOR

v.

RADOVAN KARADZIC

PUBLIC WITH PUBLIC ANNEXES

**RESPONSE OF THE UNITED STATES OF AMERICA
TO THE TRIAL CHAMBER'S 27 JANUARY 2011
"INVITATION TO THE UNITED STATES OF AMERICA"**

Office of the Prosecutor

Mr. Alan Tieger

Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadzic

United States of America

Ms. Karen K. Johnson

Introduction

The United States of America respectfully requests that the Trial Chamber dismiss Radovan Karadzic's "Third Motion for a Binding Order: Government of the United States of America," filed on 24 January 2011 ("54*bis* Motion" or "Motion"). Accused's Motion fails to meet the basic threshold for issuance of a 54*bis* order – namely, that the party to which the request is directed has declined to cooperate.¹ On the contrary, the United States has been working cooperatively and continuously with Accused to ensure the conclusion of this long-running information request, and had told Accused that the final potentially responsive document is with a third party for review.

I. Background

Since receiving Accused's lengthy information request in 2009, the United States has made great efforts to respond cooperatively, as a mark of our commitment to the principle of fair trials and to this Tribunal. Despite expressing ongoing concerns with the request's scope and nature, the United States invested significant time and resources in responding, and we have provided Accused with a large number of documents. It should be noted that Accused's request has not remained static. Over this period, he has both added and dropped categories of documents. We have also sought clarification and justification of the requested items, with a limited degree of success. Throughout, our commitment to resolve matters voluntarily has not changed.

This long process is nearly at an end, as evidenced by the annexed correspondence.² At this point, as Accused is aware, there remain only two still-open matters. One is item (1)(C) of Accused's request, the alleged "Colonel Richardson Memorandum." Here, we have informed Accused that we have been unable to locate the document, but have voluntarily offered to work with the United Nations to determine whether a copy can be found in UNPROFOR archives.

¹ For this reason, the United States will not here address the issue of whether Accused's Motion meets the specificity, relevance, and necessity requirements of Rule 54*bis*. However, should the Trial Chamber determine that it needs to examine these issues, the United States respectfully requests it be given the opportunity to present an additional filing with its views.

² Karen Johnson letters of September 15, 2010 and December 1, 2010, and emails of January 12, 2011, January 18, 2011, and January 21, 2011.

The other still-open item is (1)(E), which reads as follows:

“All reports or memoranda of investigation and interviews conducted by the Department of Defense, National Security Council³ or Central Intelligence Agency concerning the delivery of arms, ammunition, or military equipment by air to Tuzla in February-March 1995.”

As the annexed correspondence makes clear, the United States informed Accused’s legal adviser that there is only one outstanding document that is potentially responsive to (1)(E). We explained that this material (a report with a number of supporting documents) must undergo declassification, and that it requires review by a third party. The correspondence also makes clear that the United States was undertaking an additional effort to locate material responsive to (1)(E), in order to ensure that we had done a thorough search. That final effort has since been completed; it turned up no other documents.

In the most recent email exchange on this matter, on January 21, 2011, we assured Accused’s legal adviser that we would either provide the material that we had located, or, if it could not be declassified, inform him of that fact, as soon as possible. We explained that because the material was in the hands of a third party, we could not guarantee a response by a date certain, but that we had asked the third party to expedite review.

Three days after that email exchange, on January 24, Accused filed his Motion seeking to compel the production of material responsive to 1(E). In the motion, Accused admits the United States has been “cooperative,” but cites as his rationale for filing that the provision of this material has taken a long time.⁴

On January 28, 2011, the United States received the Trial Chamber’s January 27, 2011 “Invitation to the United States of America,” in which it invited the United States to file a response to Accused’s Motion within 14 days of receipt.

³ In recent correspondence, Accused’s legal adviser identified this entity as the NSA (National Security Agency) as opposed to the NSC (National Security Council). Regardless of which he means, the position of the United States Government as expressed in the instant filing is unchanged.

⁴ Motion, para. 35.

II. Argument

The Appeals Chamber has held that binding orders against States are to “be reserved for cases in which they are really necessary.”⁵ This is not one of those cases. In fact, Accused has failed to satisfy the threshold requirement that such a motion can only be filed *after* a State has declined to lend the requested support.⁶ Far from declining to lend support, the United States has gone to extraordinary efforts since first receiving Accused’s information request to locate, to declassify as necessary, and to provide potentially responsive material. That lengthy and onerous process of cooperation, which has resulted in the transfer of hundreds of pages of documents, and which involved significant back-and-forth, is nearly at an end: Only a single potentially responsive document remains in the balance.

The United States has explained to Accused the status of this final document, and the requirement for review by a third party. Third-party review is essential, since the document contains material classified by that third party for the protection of its security interests. We have also recently been made aware that the material may contain some classified material that potentially belongs to a fourth party. The United States is not in a position unilaterally to declassify sensitive materials that it does not own and that it did not originate -- nor can or should it be compelled to do so.⁷

In light of these circumstances, Accused’s motion is without foundation. His impatience to receive this final material does not constitute an appropriate basis for the issuance of a 54*bis* order. That said, we understand that the third party is making efforts to complete its review as soon as possible, and we can assure the Court that when it does so, we will respond promptly to Accused. We have also contacted the potential fourth party to request an expedited review.

⁵ See, for example, *Prosecutor v. Milutinovic et al.*, Decision on Request of the United States of America for Review (12 May 2006), at para. 27.

⁶ “Only after a State declines to lend the requested support should a party make a request for a Judge or a Trial Chamber to take mandatory action as provided for under Article 29.” *Id.* at para. 32. See also *Prosecutor v. Karadzic*, Decision on the Accused’s Application for Binding Order Pursuant to Rule 54*bis* (United States of America) (13 October 2009).

⁷ See discussion in above-referenced *Prosecutor v. Milutinovic et al.* Decision, paras. 39 to 45.

Conclusion

For the above-mentioned reasons, the United States respectfully requests that Accused's 54*bis* Motion be dismissed.

Word count: 1184

A handwritten signature in black ink, appearing to be 'KJ', followed by a long horizontal line extending to the right.

Karen K. Johnson
Deputy Legal Counselor

Dated This 11th Day of February 2011
In The Hague, the Netherlands

Public Annexes to 11 February 2011 Response of the United States of America to the
Trial Chamber's 27 January 2011 "Invitation to the United States of America"

Letters of September 15, 2010, and December 1, 2010, and emails of January 12, 2011, January 18, 2011, and January 21, 2011



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September 15, 2010

Mr. Peter Robinson

P.O. Box 1844

Santa Rosa, CA 95402

Via email: peter@peterrobinson.com

Re: Prosecutor v. Karadzic; Case IT-95-5/18-T; International Criminal Tribunal for the former Yugoslavia (ICTY); Mr. Karadzic's letter of August 30, 2010

Dear Peter:

I am writing in response to Mr. Karadzic's letter of August 30, 2010. In his letter, Mr. Karadzic indicates that in light of the materials we have provided he has further refined his request for information. He also notes his appreciation for the cooperation and "considerable effort" of the United States in providing material, but expresses his desire to "bring this informal process to its conclusion." The letter asks that we provide all remaining material by September 15, and notes that the three items specifically mentioned in the letter – an Intelligence Oversight Board report; a transcript of a "deposition" by Richard Holbrooke; and certain debriefing information received from Mr. Jacques Monsieur, who is in U.S. custody – should be "very easy to locate" and "should not be burdensome" to provide.

Let me say that we, too, are anxious to bring this process to an end. We have provided several hundreds of pages of material and expended significant time and effort to cooperate voluntarily with burdensome requests for information that we believe are – at best – of minimal or marginal value to your client's defense. For over a year, in writing and in our meetings, I explained that the request was overly broad and urged that it be narrowed to material that is truly necessary to your client's defense. I also urged you to explain how the material is of value to your client's defense, explaining that United States policy is to support the fair-trial principle by cooperating with requests that are both reasonable and justified. Up until June of this year, you indicated that you would not be narrowing the request, and, in fact, the request was expanded to cover new materials. In addition, the explanations for why the items were important for your client's defense were often vague or unconvincing and changed little over the course of the year. That said, we acknowledge the fact that your client's two most recent letters, of July 28 and August 30, have considerably refined the request. As those letters note, this has been done in light of the Trial Chamber's rulings on which categories of information may or may not be relevant to your client's defense.

as well as the (considerable) information we have provided to date.

We are now nearing the end of what has been a time-consuming and labor-intensive process. We believe that the few remaining matters can be resolved with a little more effort by both sides, and welcome your cooperation in this regard. Let me first discuss the three specific items mentioned in the August 30 letter, and then address the remaining matters.

The situation regarding the three specific items is as follows. First, the August 30 letter asks for certain information relating to alleged "arms dealings in the former Yugoslavia" that would have been contained in "debriefing interviews" of Mr. Jacques Monsieur, who is in federal custody in the United States and who "has entered into a plea agreement in which he has agreed to cooperate and be debriefed." We note that Mr. Monsieur was convicted of conspiracy to illegally export military equipment to Iran in 2009, not the former Yugoslavia between 1992 and 1995; furthermore, ICTY court records show that you have received from the government of Belgium a number of boxes of materials related to Mr. Monsieur. In any event, the United States Government has no responsive information.

Second, you have requested a transcript of a "deposition" by Richard Holbrooke before the Select House subcommittee on September 27, 1996. The August 30 letter notes that this material is "necessary" given that Ambassador Holbrooke is "likely to be requested to testify as a witness in my case." Ambassador Holbrooke has not been asked to testify by the Prosecution, and we have received no request from your client. There is no basis for believing that Ambassador Holbrooke's testimony in the instant case could serve any legitimate purpose. Furthermore, although we have not been able to locate the specific "deposition" you have requested, we have provided the various transcripts of testimony and reports that we have found to date from the relevant Congressional hearings, including some testimony from Ambassador Holbrooke. We are currently trying an additional avenue to locate the "deposition", and if we find it, we will consider whether we can provide it. If this avenue proves unsuccessful, we will consider this issue closed, given the fact that we have already provided considerable material on this topic, that the Congressional hearings were focused on the irrelevant topic of the allegations concerning U.S. knowledge of arms smuggling into Bosnia, and that the stated need for the material is for the unlikely event of Ambassador Holbrooke's testimony.

Third, you have requested an Intelligence Oversight Board (IOB) report concerning "allegations of U.S. Government personnel" assisting in the supply of arms and ammunition to the Bosnian Muslims. The August 30 letter states that this report is necessary because it will assist in establishing "who was responsible" for the shipment of arms, and that the Trial Chamber "has already held that the material related to the Tuzla shipments is relevant." On the contrary, in its decision concerning Iran, the Trial Chamber has made clear that the issue of a state's knowledge or approval of the supply of arms to Bosnia is irrelevant to the case. Thus, there is no need for the report, and we consider this item closed. We note that in any case we have already provided materials on the above-mentioned Congressional hearings, which examine in detail the issue of a U.S. role in relation to the supply of arms to the Bosnian Muslims.

In terms of other outstanding issues, you have asked us to prioritize three items related to the so-called Tuzla flights. We have done so, although review of some of the materials has proved cumbersome. In any event, we expect to provide you with some additional materials within three weeks, and at that point will have completed this item of the request.

There is little else remaining. We are processing a couple additional documents on the newest of your requests, related to alleged meetings between Ambassador Zimmerman and President Izetbegovic regarding the Cutileiro agreement. We should have these materials for you within three weeks as well, but note that the documents (as has been the case with other materials requested) do not support your assertions and so are likely of no value to you, even if their subject were relevant and necessary to your client's case.

The sole outstanding category of requested documents concerns certain materials related to two individuals whom you state were in Bosnia at some unspecified point in the 1992-1995 period: Khalid Sheikh Mohammed and Clement Hampton Rodney El. The first is in custody pending prosecution for his alleged role in plotting the attacks in the United States of September 11, 2001, a matter unrelated to Bosnia; the second is in prison for his role in terrorist acts on the United States, including the first World Trade Center bombing in 1993. Your client's July 28 letter reiterates the same unconvincing reason for requesting this material that he has offered on previous occasions – essentially, that it will “show that Bosnian Muslims wanted an Islamic state in Bosnia” and that information about why these individuals were in Bosnia and what they were fighting for “will explain why we refused to live under Muslim domination and took the actions necessary to defend ourselves from that.” At best such material would represent a classic *tu quoque* argument, but in fact it does not make sense that information from two foreigners could show why Bosnian Muslims wanted an Islamic state in Bosnia. We have pressed repeatedly for a better explanation for how this material relates to your client's defense, but to no avail. Nevertheless, we have located some material that we are prepared to provide, and which we will include in our next tranche of materials.

In any event, we remain prepared to cooperate and finally complete this request. When the next tranche of materials is ready, I will contact you to make the necessary arrangements.

Sincerely,



Karen K. Johnson

Deputy Legal Counselor



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December 1, 2010

Mr. Peter Robinson
P.O. Box 1844
Santa Rosa, CA 95402

Via email: peter@peterrobinson.com

Re: Prosecutor v. Karadzic; Case IT-95-5/18-T; International Criminal Tribunal for the former Yugoslavia (ICTY); Mr. Karadzic's letter of November 1, 2010

Dear Peter:

I am writing in response to Mr. Karadzic's letter of November 1, 2010. Let me address the matters raised in that letter in the order they appear therein.

First, the November 1 letter requests that we provide the remaining material as soon as possible. We will certainly do so; indeed, we regret the delay in providing the next tranche of materials. We have been working to locate and/or review the remaining materials, as applicable. We have repeatedly asked for this review to be expedited, but it has taken significantly longer than predicted. In part, this is because the review process involves a non-U.S. Government party, and has proved somewhat cumbersome. In any event, as soon as this material is ready for release, we will contact you.

Second, the November 1 letter acknowledges the difficulty we have had in locating item (1) (C), the alleged Col. Richardson Memorandum. The letter provided some information concerning this memorandum, and suggested we might be able to obtain a copy from the Dutch government. We have since been in contact with the Dutch government, and have learned that this memorandum may be in UNPROFOR archives in Geneva. We will be in touch with the U.N. archives to see whether they can locate it, at which point we will review it for possible release to you and your client.

Third, the November 1 letter seeks "to confirm" that the United States will "not be providing" certain items, specifically items (1)(B), (1)(E), (2)(F) and (2)(L).

In terms of (1)(B) and (1)(E) -- that is, materials related to alleged arms deliveries to Tuzla -- we are currently reviewing the remaining potentially responsive materials for possible release. We have already provided all other materials that we have found that are responsive to item #(1). As mentioned above, we have asked that the review of these materials be expedited.

On (2)(F), I note that the November 1 letter has narrowed the original request, which was for a copy of a report by the Intelligence Oversight Board (IOB) concerning, as stated in your letter, "allegations of U.S.

Government personnel assisting in the supply of arms, ammunitions, and military equipment to the Bosnian Muslims," to a request for "portions" of that same report. However, the November 1 letter did not address the fact that, as we pointed out in our letter of September 15, the Trial Chamber has found that the issue of a state's knowledge or approval of the supply of arms to Bosnia is irrelevant to the case. Nor does the November 1 letter address the fact that we have already provided various materials on this topic, including a Congressional report that examines in detail the issue of a U.S. role in relation to the supply of arms to the Bosnian Muslims. As a result, there is no basis to modify the position expressed in our letter of September 15, to wit, that there is no need for the report. In addition, I would like to add a point concerning the nature of IOB reports and the onerousness of this particular request. The IOB is an independent entity within the office of the U.S. President that is charged with overseeing the intelligence community's compliance with U.S. law. The reports of the IOB are highly classified and very sensitive. Thus, in light of the lack of any satisfactory explanation of the report's relevance or necessity, the onerousness of the request, and the fact that by its very nature your request raises national security concerns, we ask that you withdraw the request for this item.

Similarly, on (2)(L), a September 27, 1996 deposition of Richard Holbrooke before the Select House subcommittee, our letter of September 15 raised a number of concerns. For example, we emphasized that we have already provided various transcripts of testimony and reports from the Congressional hearings at issue, including testimony by Ambassador Holbrooke. We also questioned the assertion that the material is "necessary" because Ambassador Holbrooke is "likely to be requested to testify as a witness in my case." There is no request for Ambassador Holbrooke's testimony and no reason to believe such testimony would serve a legitimate purpose. However, the November 1 letter does not attempt to address these or the other concerns we raised. Nevertheless, we have continued our efforts to locate and access this item, but have recently been advised that this legislative branch document will also prove onerous to access or to review and/or declassify for possible provision. For these reasons, as well as those additional reasons expressed in our letter of September 15, we do not believe there is any basis to proceed. We thus ask that you also withdraw the request for this item.

Again, we remain prepared to cooperate and finally complete this time-consuming and long-running information request. As soon as the next tranche of materials is ready, I will contact you to make the necessary arrangements.

Sincerely,



Karen K. Johnson
Deputy Legal Counselor

From: Johnson, Karen K
To: 'Peter Robinson'
CC: Musselman, Barbara E
Subject: Update
Sent: 1/12/2011 11:45:23 AM

Dear Peter,

As discussed, here is an update on our efforts to respond to your information request. As you can see, we are very nearly done, and there is no need for involvement by the Trial Chamber.

At this point, based on our various communications, there are only two or three pending items: 1(B), 1(C), and 1(E). As you know, on 1(C) we have agreed to reach out to another party since we cannot find the document.

On 1(B), we should be providing you the remaining potentially responsive material -- a recently declassified document -- by tomorrow afternoon or Friday. I will be in court late tomorrow afternoon, and in meetings part of Friday, so have copied Barbara Musselman here. One of us can meet with you and give you the document. If neither day is convenient for you, we can try next week, any day except Monday (when the Embassy is closed in honor of Martin Luther King, Jr.).

On 1(C), as we informed you previously, we have been unable to find the alleged Col. Richardson memorandum. As mentioned in the letter of December 1, however, we have learned that a copy may be in UNPROFOR archives. We have since been in contact with the U.N. to ask them to try to locate the document. We are not sure how long this process might take.

On 1(E), we have completed the USG review of the remaining potentially responsive material. The material is currently with a third party for its review. We asked the party to expedite its review. We have recently been informed that it would take another 3-4 weeks.

Please let me know whether you have any questions, and what time might be convenient for you to pick up the 1(B) material.

All the best,

Karen

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To:

Subject:

FW: Update

-----Original Message-----

From: Johnson, Karen K

Sent: Tuesday, January 18, 2011 6:15 PM

To: 'peter@peterrobinson.com'

Subject: RE: Update

Dear Peter,

I have checked with Washington, which confirms that we have found one item that is potentially responsive to 1(e). This material consists of a report with some supporting documents. We can't provide additional details about the document pending third-party review for declassification.

This is the only responsive material that we have located to date. We are making one additional effort to locate material. If that effort should prove fruitless, then -- with the exception of the item mentioned above -- our response to this request will be complete.

Best wishes,

Karen

Karen K. Johnson

Deputy Legal Counselor

Office of the Legal Counselor

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This email is UNCLASSIFIED.

From: Johnson, Karen K
To: 'Peter Robinson'
Subject: RE: Binding order motion
Sent: 1/21/2011 6:17:30 PM

Dear Peter,

I addressed this issue in my prior email and have little more to add.

To reiterate, there is only one outstanding item that we have located that is potentially responsive to item 1(e). This material consists of a report with a number of supporting documents. This material is with a third party for review, and although we have asked for it to be expedited, we cannot guarantee a response by a date certain. That said, we have been informed that the review should be complete in approximately two weeks. As previously mentioned, I cannot provide further details pending declassification. But be assured that we will either provide you this material, or inform you that we cannot declassify the material, as soon as we can.

My prior email also mentioned one additional effort to locate material responsive to 1(e). We initiated this effort to ensure that we had done a thorough search and could finally put this issue to bed. We will know next week whether this final effort resulted in the identification of any potentially responsive material.

I thus see no basis for you to file another 54bis motion. In fact, it would be counterproductive, since it would tie up our time responding to a frivolous motion rather than finally completing our search for, and provision of, the last remaining material that we have located that is responsive to your information request.

Karen

Karen K. Johnson
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This email is UNCLASSIFIED.

From: Peter Robinson [<mailto:peter@peterrobinson.com>]
Sent: Thursday, January 20, 2011 3:41 PM
To: Johnson, Karen K
Subject: Binding order motion

Dear Karen,

I wanted to let you know that we withdrew our request for binding order against the United States by oral motion before the Chamber today. The Chamber had inquired about the status and indicated that it preferred we withdraw the motion and file a new one for the three reports